

## Determination

### External review - section 39 *Freedom of Information Act 1991*

<b>Applicant</b>	Hon Robert Brokenshire MLC
<b>Agency</b>	Department of the Premier and Cabinet
<b>Ombudsman reference</b>	2014/02025
<b>Agency reference</b>	DPC13/2843
<b>Applicant reference</b>	08594
<b>Determination</b>	The determination of the agency is varied.

## REASONS

### Application for access

1. By application under the *Freedom of Information Act 1991* (the FOI Act) the applicant requested access from the agency to:

Copies of invoices, documents or other summary information demonstrating the full costs of the advertising budget on radio, print, television, billboards, online et cetera, and the stationery and graphic design costs for promoting:

- a. "Building a Stronger South Australia" campaign;
- b. The "More than Cars" campaign
- c. The Integrated Transport and Land Use Plan.

### Background

2. For ease of reference, the procedural steps relating to the application are set out in the appendix.

### Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

### Provisional determination

4. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 15 July 2014. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
5. The agency and the interested party provided submissions in response. I have considered these submissions in this determination.

## Relevant law

6. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.<sup>1</sup>
7. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access.
8. Clauses 7(1)(b), 7(1)(c), 13(1)(a), and 16(1)(a)(iv) with 16(1)(b) of Schedule 1 to the FOI Act are relevant to my external review. They provide:

### **Clauses 7(1)(b) and 7(1)(c)**

- (1) A document is an exempt document—
  - (b) if it contains matter—
    - (i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and
    - (ii) the disclosure of which—
      - (A) could reasonably be expected to destroy or diminish the commercial value of the information; and
      - (B) would, on balance, be contrary to the public interest; or
  - (c) if it contains matter—
    - (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
    - (ii) the disclosure of which—
      - (A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
      - (B) would, on balance, be contrary to the public interest.

### **Clause 13(1)(a)**

- (1) A document is an exempt document—
  - (a) if it contains matter the disclosure of which would found an action for breach of confidence...

### **Clauses 16(1)(a)(iv) with 16(1)(b)**

- (1) A document is an exempt document if it contains matter the disclosure of which—
  - (a) could reasonably be expected—
    - (iv) to have a substantial adverse effect on the effective performance by an agency of the agency's functions; ... and
  - (b) would, on balance, be contrary to the public interest.

9. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
10. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

<sup>1</sup> *Freedom of Information Act 1991*, section 12.

## Documents in issue

11. The agency identified 23 documents within the scope of the application.
12. By notice dated 7 March 2014, during the course of my external review, the agency determined to give partial access to each of the documents.<sup>2</sup>
13. By email dated 13 March 2014 the applicant advised that he remained aggrieved by the agency's refusal to release documents 18 and 19 in full. The agency's schedule of documents describes them as follows:
  - Document 18 MEC Media Schedule - More than Cars
  - Document 19 Media Authorisation Form - More than Cars
14. The parts of documents 18 and 19 that have not been released to date are in issue in my review (**information in issue**). The information in issue comprises the rates and gross amounts charged by individual media outlets; the quantity of advertising units purchased; rebates; fees charged by MEC Adelaide (**MEC**); the total cost, including and excluding GST; and other fees.

## Issues in this review

### Claims of exemption

15. The agency claims that documents 18 and 19 are exempt as documents affecting business affairs (clause 7(1)(c)); documents containing confidential material (clause 13(1)(a)); and documents concerning operations of agencies (clauses 16(1)(a)(iv) with 16(1)(b)).<sup>3</sup> It has released the documents after deleting the information in issue.<sup>4</sup>
16. Although not claimed by the agency, given the submissions raised by MEC, an interested party, I have also considered clause 7(1)(b).<sup>5</sup> MEC is a company 'dedicated to media planning and buying'.<sup>6</sup>
17. It is for me to consider whether the agency has justified its determination to refuse access to the information in issue, or whether there is sufficient evidence before me from which I am able to be satisfied that all elements of the clauses relied on by MEC are established.

### Sufficiency of search

18. The agency claims that only 23 documents fall within the scope of the application for access. The applicant is of the view that the agency has failed to identify all relevant documents.
19. It is my role to consider, on the evidence provided to me, whether there are reasonable grounds to believe that additional documents within the scope of the application exist and are held by the agency. If so, I must then consider whether the agency's searches to locate such documents have been reasonable in the circumstances.

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<sup>2</sup> This is permitted by *Freedom of Information Act 1991*, section 19(2a).

<sup>3</sup> The agency first raised its claim under clauses 16(1)(a)(iv) with 16(1)(b) in response to my provisional determination.

<sup>4</sup> In accordance with *Freedom of Information Act 1991*, section 20(4).

<sup>5</sup> I have a discretion to consider exemptions not relied upon by the agency: *Department of the Premier & Cabinet v Redford* (2005) 240 LSJS 171 [29].

<sup>6</sup> <http://www.mecglobal.com.au/adelaide/about-us/> accessed on 24 June 2014.

## Claims of exemption

### Agency's submissions

20. In its notice of determination, the agency included the following reasons in support of its clause 7(1)(c) claim:
- the information in issue relates 'to the charges paid under a master media contract' (**the contract; the MMA**)
  - 'rates charged by each individual media agency is [sic] kept strictly confidential on the basis that ... [government rates] are negotiated against the amount spent and any resulting discounts vary from agency to agency and are known only to the negotiating parties'
  - disclosure of the information in issue may cause 'commercial damage to that agency by disclosing the outcome of confidential negotiations to its competitors'
  - disclosure 'would cause damage to the relationship between the government and media outlets' because negotiations are assumed to be confidential.
21. The agency acknowledged that disclosure of the amounts spent on government advertising was 'very much in the public interest', but concluded that this was outweighed by the public interest in:
- 'ensuring the government can negotiate the best possible [advertising] rates'
  - ensuring that parties to the negotiations 'do not suffer commercial damage'
  - maintaining 'a positive working relationship' between the government and its suppliers
  - the agency has disclosed the total amount it has spent for the relevant campaigns.
22. By letter dated 10 June 2014 the agency repeated the above submissions. In addition, the agency claimed that disclosure of the information in issue would found an action for breach of contract under a term of the contract. It provided extracts of the contract to my office.<sup>7</sup> Although the agency expressed reluctance to provide the complete version to my office, much of it is publicly available.<sup>8</sup>
23. In response to my provisional determination, the agency provided detailed submissions, labelled 'confidential'. The agency's submissions may be summarised as follows:
- some of the information identified in paragraph 28 of my provisional determination is, or may be, 'required to be kept confidential under clause 11.4' of the contract, namely:
    - From document 18:
      - the 'radio' and 'adshel' amounts in the shaded box below the main table. This is because these amounts 'represent the production component of the amounts that the relevant media companies charged the State in respect of this particular campaign' and therefore 'form part of the "rates"'.
    - From document 19:
      - the figures in the sixth to last row of the table, in the columns headed 'Rate Card' and 'Gross Media Cost':
- These figures 'represent the total estimates (or quotes) for the services at the standard rates ... ('the Rate card amount') and the quoted rates for this campaign ('Gross Media Cost'). Disclosure of these amounts clearly indicates the discount that was offered by the providers and each provider

<sup>7</sup> The cover and execution pages, and clauses 1, 1.1, 1.1.1 to 1.1.6, 11, 11.1 to 11.4 and 44.14.

<sup>8</sup> Via <https://www.google.com.au/#q=mediaedge+and+state+of+south+Australia> (the ninth result, a PDF document, with the link commencing <https://www.tenders.sa.gov.au/tenders/contract/download.do?id=6022...>) accessed on 14 July and 15 July 2014. In response to my provisional determination, the agency advised that the whole contract is not accessible via this link.

- would be easily able to work out what discount was provided by its competitor.
- the 'ad serving' figure in the shaded box below the main table in document 18 'essentially represents the "production" costs ... [of] services ... provided by ... Media Edge... under the MMA'. The agency accepts that the figure 'does not appear' to be exempt under the contract. That said, the agency claims that disclosing the figure, in conjunction with another figure in the final column, would potentially reveal the radio and adshel amounts, or enable media companies who charged for radio or adshel production to deduce what each other charged, and may therefore 'be contrary to clause 11.4 of the MMA'. In addition:
    - ... if the total 'Ad Serving/Production' figure was not disclosed, but the 'ad serving costs', 'Media Rebate' and 'MEC fee' were disclosed this could similarly potentially reveal ... the radio and adshel production figures by some simple subtraction. The Department accepts that the 'Media Rebate' and 'MEC fee' amounts do not fall within clause 11.4 in and of themselves.
  - noting that document 19 'details the costs of the online aspects of the campaign', the agency claims that the figures in the third to last and last rows of the table in document 19, in the column headed 'Gross Media Cost', are similarly exempt
  - although the agency has disclosed the 'total media cost to client' amount in document 19 and this:
    - could potentially disclose the rates charged by one provider to its competitor... this is not a basis to exacerbate any potential breach of clause 11.4 of the MMA by further disclosure of information ... and it does not compromise the application of clause 13 ... to the additional information.
  - even if the above charges are not strictly caught by clause 11.4:
    - ... disclosure of these amounts would be detrimental to the State and contrary to the public interest in the context of Clauses 7 and 16(1)(a)(iv) ... in that it would mean that the State would be less likely to get discounted rates as, once such rates are disclosed, all of the clients of that company would be demanding similar benefits.
  - some information concerns 'the business affairs of the media organisations who provided the production and digital advertising services', none of which have been consulted under the FOI Act
  - the agency also made submissions regarding the impact that disclosing payments made to Media Edge may have 'on the imminent and future tendering for these services':
    - tendering 'is based on a service delivery model. This means that the price and remuneration structure will not be standard across the submissions to the process and will vary with each proposal'
    - the MMA 'is a whole of Government contract'
    - 'South Australia has had a MMA agreement in place since 1993'
    - 'The MMA ... is able to generate very favourable advertising rates from the media [and significant added value]. This results in significant savings to Government in reducing overall expenditure by its agencies while meeting its communications obligations to the community'
    - 'There are currently two MMA contracts, a Brand Services contract and a Functional Services contract and the last tendering process called for bids for either one or both of these contracts'
    - in the future procurement process, the government will be '... looking for a proposal that provides specialist media advertising services that will best meet the current and future needs of Government and will ensure the best value for money from its advertising spend for the life of the project...'
    - disclosing the payments:
      - 'will ... not only disclose the amounts paid but also the pricing structure under the current contract'
      - '... could negatively influence future tendering processes in that it is likely to lead to less diversity and creativity in the bids submitted (as bidders are more likely to mirror a structure that has been seen to be

- successful in the past) and ... this could prevent the State from being about to get the best value for money for its future advertising spend
- the agency acknowledged 'the public interest in knowing how much is being spent on media advertising', but submitted 'that there is a significant public interest in ensuring ... that the State gets the best value for money for those amounts'
  - noting that the total amounts spent have already been disclosed to the public, the agency submitted that, on balance, the public interest 'would lie in ensuring that future contracts get the best value for money for the State rather than in disclosure of' the specific amounts paid under the MMA.

### Applicant's submissions

24. By email dated 13 March 2014, in response to the reasons set out in agency's notice of determination, the applicant submitted:

I understand the arguments on Documents 18 and 19 raised by the Department, but countervailing that is the need to ensure the Government is getting value for money when engaging in this form of advertising. Were the rates to be well in excess of what are ordinarily paid in the circumstances, or conversely far lower than what would be ordinarily paid in the circumstances, either scenario raises questions about how that arrangement is arrived at.

### Interested party's submissions

25. By email to the agency dated 17 February 2014 MEC objected to disclosure of the information in issue. MEC described the information in issue as 'commercial in confidence' and submitted that disclosure would destroy its commercial value. MEC's response included the following submissions.

Media rates and spend levels:

- disclosure 'would mean competitor media outlets would be able to see what [sic] their competitors charge, or what amount of spend competitors received'
- the government's rates are determined by volume and how the money is allocated
- to disclose what one media outlet charged would enable others in the same field to reduce their discounts while remaining competitive, and thereby diminish the government's ability 'to negotiate the lowest rates possible'
- disclosure of the total television budget 'would jeopardise the negotiations and relationships with the TV stations' because negotiations are often based on the share of the total budget that will be spent

MEC fee, media rebate and ad-serving costs:

- they 'represent MEC's contracted service fees to SA Government clients'
- disclosure would provide an advantage to MEC's competitors; 'when the account is tendered later this year ... [they] can undercut us'
- '[r]evealing the rebate and adserving fees would also reveal the fee structure MEC use'.

26. In response to my provisional determination, MEC indicated that it was not opposed to the figures in the column headed 'Total Number' being released, but maintained that the remaining information set out at paragraph 28 of my provisional determination was 'commercial in confidence' and exempt. MEC provided the following submissions in support of its position:

#### Media rates

The media rates ... are negotiated on an annual basis and are predicated on our best estimates of spend by medium. The key elements of these negotiations relate to the

volume of expenditure, share of market/channel and cost effectiveness. These negotiations are conducted with the media and are fully disclosed to the SA Government. The results of these negotiations are independently audited by a third party media auditor (enth degree),<sup>9</sup>] before being submitted to PCAG and the Premier for approval.

Once rates have been approved across all media, contracts are established with all relevant media owners. As far as the media are concerned, these rates are confidential and should not be divulged to any third party... [including] ... another client or Agency.

Conversely, it is absolutely vital from a Media Agency perspective that none of our competitors are aware of rates or terms and conditions that we have negotiated. One of our key competitive advantages is to use our 'clout' in market to offer our clients the lowest possible rate position and added value opportunities.

The idea that the 'disclosure of the amounts paid to individual media outlets would enable the public to make assessments about whether the government was getting value for its expenditure of public money' is based on the premise that the public has a means of comparison, and that it is educated in this area. The opinion of an independent third party auditor would surely hold much more weight.

#### MEC Fees

Our (MEC's) fees should always be considered confidential.

The SA Government is the highest profile media account in Adelaide and therefore is highly sought after by all media Agencies... A new tender for SA Government media will be in market later this year, so the dissemination of our fees and charges to third parties could have a significant impact and places us at a severe disadvantage against other media Agencies. Showing the rebate and ad serving fees would also reveal our fee structure, so that is why we don't want these shown.

...

... The media schedules as they stand clearly show all the campaign activity which should be the only relevant information for the Applicant.

### **Consideration**

#### ***Clause 13(1)(a)***

27. I turn first to consider whether the information in issue is exempt under clause 13(1)(a). To succeed in claiming clause 13(1)(a) as a basis for refusing access to a document it is necessary to demonstrate that the relevant document contains matter 'the disclosure of which would found an action for breach of confidence'. The word 'would' should be read as 'could'.<sup>10</sup>
28. As the agency has claimed that the obligation of confidence in this instance is contractual, I must be satisfied that the document contains matter, the disclosure of which would, under a term of the contract, be a breach of the contract or would found an action for breach of confidence.
29. The contract is between the State of South Australia and Media Edge ('Master Media Agency'). It is dated 18 February 2010 and was signed by the Premier on behalf of the State of South Australia. Clauses 13(2) to 13(7) of Schedule 1 to the FOI Act do not apply.
30. Clause 11.4 of the contract requires that:

<sup>9</sup> According to enth degree's website, 'Media Audits review the media agency's invoicing procedures and ensures that invoices emanating from the agency align with those raised by the media' and are conducted by a qualified accountant: <http://enthdegree.com.au/do-you-need-a-media-audit-or-a-media-review/> accessed on 1 September 2014.

<sup>10</sup> *Bray and Smith v WorkCover* (1994) 62 SASR 218 at 226 to 228.

The State shall use its best endeavours to ensure that ... each Client keeps confidential the rates negotiated on the State's behalf by the Master Media Agency.

31. Clause 1.1.4 provides that the term 'client' 'means the government departments, statutory authorities, crown instrumentalities and other bodies specified in Schedule 1 of this Deed'.
32. To my knowledge, the majority of the information in issue is not publicly known.
33. Having regard to the above facts it appears that the document is exempt under clause 13(1)(a).
34. That said, I am not satisfied that the following information in issue is exempt under clause 13(1)(a):

From document 18:

- the figures in the column headed 'Total Number' (referring to the quantity of advertising purchased)
- the final figure in the shaded box that appears below the main table, near the centre of the page (**the ad-serving cost**)
- from the final column, the figures in the rows commencing:
  - 'Media Rebate'
  - 'MEC fee'
  - 'Ad Serving/Production'
  - 'Total Cost ex GST'

From document 19:

- the figures in the third to last, sixth to last, and last rows of the table, in the column headed 'Gross Media Cost'.

35. I have come to this view because the information described in paragraph 34 (**the paragraph 34 information**) does not appear to be subject to a confidentiality clause within the contract. With respect to document 19 I have also borne in mind the figure representing the 'Media Cost to Client' that has been released.

***Clauses 7(1)(b) and 7(1)(c)***

36. Given this, I will proceed to consider whether the paragraph 34 information is exempt under clause 7(1)(b) or clause 7(1)(c).
37. I am of the view that the paragraph 34 information does not have a commercial value to an agency or any other person in the requisite sense. Further and in any event, it is my view that its disclosure could not reasonably be expected to destroy or diminish the value of *that information*. In the event that the information is commercially valuable, I am not satisfied that disclosure of the paragraph 34 information would, on balance, be contrary to the public interest for the following reasons:
  - the information relates to a particular point in time; the information is now more than six months old
  - the figure representing the 'Media Cost to Client' in document 19 that the agency released on 7 March 2014
  - multiple factors (including the advertising brief) undoubtedly determined the amounts, and multiple factors will invariably influence future costs and rebates; such factors are not necessarily evident from the figures
  - disclosure is likely to facilitate the government, and by extension the public, obtaining the best possible deal in future tendering processes

- the objects of the FOI Act, particularly the strong public interest in members of the public being aware of how public money is spent and whether the government is getting value for its expenditure of public money,<sup>11</sup> to ensure transparency and accountability within representative government and to promote openness
  - expectations of confidentiality are ‘always subject to the provisions of the FOIA [the FOI Act] and cannot be affected by any representation ... that greater confidentiality might be accorded to material than properly reflects the effect of the FOIA.’<sup>12</sup>
38. Accordingly, I am of the view that the paragraph 34 information is not exempt under clause 7(1)(b).
39. I now turn to consider whether the paragraph 34 information is exempt under clause 7(1)(c). I accept that documents 18 and 19 contain information concerning the business affairs of the agency, MEC, and various media outlets within the meaning of clause 7(1)(c)(i).
40. I accept that disclosure of the amounts charged by MEC could reasonably be expected to have an adverse effect on MEC’s business affairs in future tendering processes. I am not satisfied that disclosure could reasonably be expected to prejudice the agency’s business affairs or prejudice the future supply of information to the agency. In my view, businesses that have a financial interest in dealing with the government and agencies are unlikely to be deterred from contracting with them, or offering them innovative and competitive proposals, in the future as a result of the disclosure of such information. In saying this, I note that MEC has described the government as ‘the highest profile media account in Adelaide and therefore is highly sought after by all media Agencies’. I do not accept that disclosure of the paragraph 34 information would make it less likely that the government would receive discounted rates, even if other clients and consumers demanded discounts, because the government is a large consumer of advertising and an attractive media client.
41. As indicated above, I have concluded that the radio and adshel production costs are exempt under clause 13(1)(a). I accept that disclosure of the ad-serving cost in document 18, in conjunction with another figure in the final column, would reveal the radio and adshel production costs. Accordingly, I am satisfied that it would, on balance, be contrary to the public interest to release the ad-serving cost in document 18, and that document 18 is therefore also exempt under clause 7(1)(c).
42. I am not persuaded that the public interest test has been met with respect to the remaining paragraph 34 information. Accordingly, in my view, the following information (**the paragraph 42 information**) is not exempt under clause 7(1)(c):

From document 18:

- the figures in the column headed ‘Total Number’ (referring to the quantity of advertising purchased)
- from the final column, the figures in the rows commencing:
  - ‘Media Rebate’
  - ‘MEC fee’
  - ‘Ad Serving/Production’
  - ‘Total Cost ex GST’

<sup>11</sup> I accept that an independent audit is likely to ensure that the government obtained what it purchased.

<sup>12</sup> *Ipex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54, 70.

From document 19:

- the figures in the third to last, sixth to last, and last rows of the table, in the column headed 'Gross Media Cost'.

### ***Clauses 16(1)(a)(iv) with 16(1)(b)***

43. The phrase 'could reasonably be expected' means that the claimed effect of disclosure of the documents is not 'fanciful, imaginary or contrived', or 'irrational, absurd or ridiculous'.<sup>13</sup>
44. The phrase 'substantial adverse effect' is important when considering clause 16(1)(a)(iv). It is not defined in the FOI Act. In the decision of *Treglown v SA Police* the South Australian District Court said that the phrase:

should be interpreted as indicating a 'degree of gravity' ... or an effect 'that is "sufficiently serious or significant to cause concern to a properly informed reasonable person"' ... (references omitted).<sup>14</sup>

45. For the reasons set out above, at paragraphs 37 and 40 in particular, I am not satisfied that disclosure of the paragraph 42 information:
- could reasonably be expected to have a substantial adverse effect on the effective performance by the agency of its functions
  - would, on balance, be contrary to the public interest.

### ***Conclusion***

46. I am satisfied that documents 18 and 19 are exempt under clause 13(1)(a), and that document 18 is also exempt under clause 7(1)(c). For the reasons set out above, I do not consider that the paragraph 42 information is exempt. In accordance with section 20(4) of the FOI Act, I consider that it would therefore be practicable to release the documents after deleting all but paragraph 42 information (that is, in addition to the previously released information).

## **Sufficiency of search**

### **Applicant's submissions**

47. By email dated 13 March 2014 the applicant questioned the sufficiency of the agency's searches to locate documents. His submissions included the following:
- the scope of his application was quite broad
  - if documents are held by other agencies, those parts of the request ought to have been transferred
  - advertising featuring the words 'Building a Stronger South Australia' was observed:
    - on a billboard 'at the intersection of Frome Road and North Terrace ... describing a 'Prospect Link' initiative ... [and] similar billboards ... promoting non-existent tram links to Unley and Norwood'
    - on a 'series of bus shelter posters ... in Adelaide (of greater height-by-length dimension than ... in the invoices provided) ... promising a "new World-Class Women's and Children's Hospital"'
- These initiatives were not budgeted for or even promised by the government at the time

<sup>13</sup> *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54, 63-64.

<sup>14</sup> *Treglown v SA Police* [2011] SADC 139 (Unreported, South Australian District Court, Judge Herriman, 20 December 2011), [203], considering *Harris v ABC* (1983) 50 ALR 551 and *Konieczka v South Australian Police* [2006] SADC 134 (unreported, Judge Boylan, 8 December 2006), following *Thiess and The Department of Aviation* (1986) 9 ALD 454.

- it is reasonable for him to conclude that the agency ‘... which has a Strategic Communications unit and is the head contracting agency for major media campaigns, was the agency that was either primarily responsible, or at least informed in a summary way as to the proposed cost of running advertisements of this nature throughout metropolitan Adelaide’
- his request should perhaps have been referred to other agencies given licence to use the ‘Building a Stronger South Australia’ branding and entitled ‘to incur the cost of the advertising without reference back to the’ agency. He nevertheless expressed some scepticism about this as the advertising he received gave the impression that the agency had ‘a key role in monitoring and ensuring the delivery of the campaign’ and:
  - Listed a [www.premier.sa.gov.au/strongersa](http://www.premier.sa.gov.au/strongersa) web address for more information
  - Included forewords from the Premier;
  - Were accompanied by a letter from the Premier to me as a Member of Parliament with a return address to the Office of the Premier.

### Agency’s submissions

48. I sought a response from the agency to the applicant’s submissions.
49. By letter dated 10 June 2014 the agency advised that the ‘Building a Stronger South Australia’ graphic was a whole of government project, rather than one specific to the agency. According to the agency, not all of the campaigns that included the ‘graphic were produced by ... [its] Government Marketing and Communications’ division. The agency noted that SA Health and the Department of Planning, Transport and Infrastructure may hold documents relevant to advertising identified by the applicant. The agency advised that ‘the Manager of Government Marketing and Communications ran specific financial reports and then printed off all relevant invoices’ to ensure that all relevant documents held by the agency were identified.
50. I understand from discussions between one of my solicitors and an officer of the agency, that the Strategic Communications Unit undertook searches for documents, as this was the logical place to search. The agency also advised that it was unlikely that documents would be held elsewhere, including in the Chief Executive’s office.

### Consideration

51. There is no obligation on an agency to transfer parts of an application to another agency. The power to transfer an application for access to another agency is discretionary and is only enlivened if certain conditions are met.<sup>15</sup> Accordingly, I do not intend to consider this issue further.
52. The FOI Act does not prescribe the manner in which questions concerning the sufficiency of the agency’s searches to locate documents within the scope of an access application are to be resolved.
53. The District Court has stated that a search for documents must be ‘reasonable and sufficient’.<sup>16</sup>
54. The Queensland Information Commissioner considers that a two-stage test is warranted:
- a) whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency...;

<sup>15</sup> *Freedom of Information Act 1991*, section 16.

<sup>16</sup> *Akritidis v Police Commissioner* [1998] SADC 291 (Unreported, South Australian District Court, Judge Robertson, 23 April 1999), 20.

- and if so,  
 b) whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstance of a particular case.<sup>17</sup>

55. This approach was considered and followed in a decision of the New South Wales Administrative Decisions Tribunal.<sup>18</sup> In that decision, Judge O'Connor said that when an applicant contends that an agency has failed to perform a sufficient search, the applicant must first put some credible material or submissions before the tribunal to satisfy it that there is an arguable case that documents of the kind requested exist.<sup>19</sup>
56. Adopting the two-stage test preferred by the Queensland Information Commissioner, the first step for me to consider is whether there are reasonable grounds to believe that additional documents within the scope of the application exist and are held by the agency.
57. I am not persuaded that there are in this instance. Having regard to the terms of the application for access, and the parties' submissions, I consider it likely that other agencies may hold documents relevant to the costs of the advertising referred to in the applicant's 13 March 2014 email.

### Determination

58. In light of my views above, I vary the agency's determination to enable the paragraph 42 information to be released.

### Comment

59. I have residual concerns about the rates and gross amounts charged by individual media outlets being exempt from disclosure for the reasons set out above (at paragraph 37 in particular) and the following factors:
- the government is an experienced, and large, consumer of advertising
  - the government is the exclusive provider of many services to the public. Although it competes for advertising timeslots and advertising space like other consumers it generally uses advertising to create awareness and not to outdo a competitor
  - the importance of the public being able to make assessments about whether the government is getting value for its expenditure of public money appears heightened by my understanding that government agencies compete against each other to obtain the best advertising deal.



Megan Philpot  
 ACTING SA OMBUDSMAN

8 September 2014

<sup>17</sup> *Shepherd v Department of Housing, Local Government & Planning* (1994) 1 QAR 464 [19].

<sup>18</sup> *Cianfrano v Director General, Department of Commerce and Anor (No 2)* [2006] NSWADT 195. This decision is available via <http://www.austlii.edu.au> accessed on 24 February 2014. Note, however, that the citation refers to *Cainfrano*.

<sup>19</sup> *Cianfrano v Director General, Department of Commerce and Anor (No 2)* [2006] NSWADT 195 [69].

## APPENDIX - 2014/02025

### Procedural steps

Date	Event
14 November 2013	The agency received the FOI application by email dated 14 November 2013.
22 November 2013	The agency acknowledged the application.
17 December 2013	The agency failed to determine the application within the 30 day period required by the FOI Act, <sup>1</sup> and is deemed to have refused access to the documents. <sup>2</sup>
	The agency sought clarification from the applicant about the scope of the application by email.
18 December 2013	The applicant's office clarified the scope of the application by email to the agency.
23 January 2014	The agency received the internal review application by email dated 23 January 2014.
28 January 2014	The agency acknowledged the application for internal review.
7 February 2014	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. <sup>3</sup>
14 February 2014	The agency consulted MEC Adelaide by email.
17 February 2014	MEC Adelaide provided submissions to the agency by email.
28 February 2014	The Ombudsman received the applicant's request for external review dated 28 February 2014.
5 March 2014	The Ombudsman advised the agency of the external review and requested submissions and documentation.
7 March 2014	The agency made a belated determination granting access to part of each of the 23 documents identified within scope of the application. <sup>4</sup>
11 March 2014	The agency provided the Ombudsman with a copy of its determination and the documents released to the applicant.

<sup>1</sup> *Freedom of Information Act 1991*, section 14(2).

<sup>2</sup> *Freedom of Information Act 1991*, section 19(2).

<sup>3</sup> *Freedom of Information Act 1991*, section 29(5).

<sup>4</sup> *Freedom of Information Act 1991*, section 19(2a).

	Ombudsman SA sought a response from the applicant in light of the agency's determination dated 7 March 2014 by email.
13 March 2014	The applicant responded to Ombudsman SA's email dated 11 March 2014.
17 March to 3 June 2014	Ombudsman SA requested further submissions and documentation from the agency by telephone and email on a number of occasions.
3 June 2014	The agency provided some additional information by email.
10 June 2014	The agency provided its submissions by email.
	Ombudsman SA requested and received some documentation in support of the agency's submissions.
11 June 2014	Ombudsman SA received further documentation in support of one of the agency's submissions.
24 June 2014	Ombudsman SA requested further documentation in support of the agency's submissions, along with consent to disclose specified information to the applicant.
7 July 2014	Ombudsman SA followed up request made on 24 June 2014 by telephone.
	Ombudsman SA received the agency's response by email and requested consent to release documents to an interested party.
8 July 2014	The agency provided consultation correspondence with an interested party to Ombudsman SA by email.
15 July 2014	The Acting Ombudsman issued her provisional determination and provided it to the applicant, the agency and the interested party.
18 July 2014	The interested party provided submissions in response to the provisional determination by email.
24 July 2014	The agency provided a preliminary response to the provisional determination.
15 August 2014	The Crown Solicitor's Office provided further submissions on behalf of the agency via email.